IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-968

DETROIT EDISON COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF AMICUS CURIAE SUBMITTED BY THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER'S BRIEF

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INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States is the largest business federation in the United States, with a total membership in excess of 74,000 enterprises and organizations representing businessmen and women throughout the United States. More than 3,700 state and local Chambers of Commerce and trade associations are members.

The case *sub judice* is of vital concern to the large number of Chamber members who rely upon testing in selecting or promoting employees — a reliance which

enables employers not only to fulfill their obligations under Title VII of the Civil Rights Act of 1964 to ensure an objective selection process, but also to minimize the risk of selecting unqualified personnel to perform jobs vital to an employer's operations.

The value of testing as an objective employee selection device in American industry and government has been confirmed by several comprehensive studies, including surveys conducted by the Personnel Policies Forum in September, 1976 (PPF Survey 114, p. 1 (BNA, 1976)) and by the United States Civil Service Commission [1] in December, 1977. The decision below, if allowed to stand, will pose significant, if not insuperable, obstacles to the continuation of the extensive testing program of Chamber members.

QUESTION PRESENTED

Whether the Company violated Section 8(a) (5) and (1) of the Act by refusing to supply the Union with copies of an aptitude test battery, the applicants' test papers, and employee-linked test scores.

STATEMENT OF FACTS

The Detroit Edison Company ("the Company") is a public utility engaged in the generation and distribution of electric power in the State of Michigan. Since approximately 1943, the Union [2] has represented various employees of the Company in approximately 28 bargaining units, including a unit composed of operating and maintenance employees in the production department of the Company's Monroe power plant (P.A. 19a).[3] Since its certification in the Monroe unit on April 1, 1971, the Union has entered into two successive collective bargaining agreements covering the operating and maintenance employees, the second of which was executed on July 3, 1972 (P.A. 20a).

In late 1971, the Company determined to fill six unit positions in the Instrument Man B classiffication — a job whose duties include the maintenance of instrumentation vital to the plant's operation. Among the posted requirements for the Instrument Man B position was a minimum of "recommended" on a battery of aptitude tests administered by Company-employed psychologists (P.A. 20a).[4] The ten Monroe employees who bid for the position were rejected [5] because they failed to achieve a "recommended" score on a test battery which was first developed by the Company in 1958, "refined" in 1969-1970, and twice validated by the Company's industrial psychologists (P.A. 21a; A. 75-78, 178-179.[6]

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[1] Status of Test Usage in FY 77, Technical Note 77-2, Test Services Section, Personnel Research and Development Center, United States Civil Service Commission (Dec. 1977).

[2] Local 223, Utility Workers Union of America, AFL-CIO (hereafter, "the Union").

[3] "P.A. references are to the Appendix to the Petition for Certiorari; A" references are to the Appendix that was prepared after the petition was granted.

[4] The other listed qualifications included high school credits for two years of mathematics and one year of science and a satisfactory physical examination and attendance record. The only selection standard challenged by the Union was the aptitude test.

[5] Five of the six positions were filled by the five most senior applicants who did achieve a "recommended" score; the sixth position was taken by an incumbent Instrument Man from another location.

[6] The Instrument Man test battery was revalidated in 1969-1970 at the suggestion of the technical engineers of the Company's power plants. In 1972 the battery was reviewed by an outside consultant, the National Compliance Company ("NCC"), in conjunction with its revalidation studies of 15 additional job test batteries utilized by the Company. It should be specifically noted that the validity of the test is not in question (A.92-93, 100, 344).

On January 17, 1972, the Union filed a grievance under the collective bargaining agreement protesting the Company's reliance upon the test results to deny the Monroe bidders promotion to Industrial Man B (A. 120).[7] While denying the grievance, the Company offered to confer with the Union "to enhance their understanding of the Company's objectives in the testing area" — an offer which the Union rejected as "completely unacceptable" (A. 153, 154). Accordingly, the Union requested arbitration of the grievance on October 27, 1972 (A. 154).

Thereafter, on March 5, 1973,[8] the Union requested for the first time the following information: (1) the actual battery of tests; (2) the method of scoring and the criteria for establishing the "cut-off" score of 10.3; (3) a report on the test validation; and (4) the report of the National Compliance Company (A. 121). In response to the Union's request, the Company arranged a meeting on April 2 to explain to the Union the entire testing program (A. 26-27, 122). At the April 2 meeting, the Company furnished the Union with the validation studies for the Instrument Man B test battery conducted by both the Company's psychologists and the NCC (P.A. 31a; A. 13-14, 343-378). The Company declined, however, to provide the Union the test batteries, the actual test papers or the actual test scores of the applicants, as a consequence of which the Union, on April 4, filed with the National Labor Relations Board ("NLRB" or "Board") an unfair labor practice charge, alleging that the refusal to provide the requested information violated the Company's duty to bargain in good faith (Section 8(a) (5)) (A. 104-106).

While the charge was pending before the NLRB, hearings were conducted before Arbitrator Jones on May 23, 24, 30 and 31 (A. 110). At the outset of the May 23 hearing, the Union requested that the Arbitrator require the Company to supply copies of the test (A. 14, 123-124). During the hearing, the Company supplied the following information:

1. Its 1970 validation study.
2. The 1972 NCC report.
3. Explanations of the tests utilized.
4. Representative sample questions.

Also during the hearings, the Company offered to administer the test battery to the Union's representative and to disclose the test scores of employees who did not object to their release — an offer rejected by the Union (A. 6-7, 44). Finally, the Company revealed the examinees' test scores without linking them to the applicants' names (A. 279-280).

After the close of the original arbitration hearings, the Union — notwithstanding the extensive information provided or offered by the Company — reiterated on June 2 its request for "the actual tests, scores and weights" (A. 125-126). By letter dated July 10, the Company, while again declining to furnish either the actual test battery or scores linked to individual names, responded affirmatively and in detail to the Union's request concerning the battery weights and scoring mechanisms (A. 127-131). On July 23, Arbitrator Jones ruled that he was not authorized under the contract to compel the Company to furnish the information, although he invited the Union to produce case citations for the contrary proposition — an invitation declined by the Union (P.A. 67a). Four days later the Union and Company agreed that the Arbitrator should decide the merits of the grievance without the requested information, subject to the Union's right to reopen the

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[7] The collective bargaining agreement requires that promotion be based on seniority "whenever reasonable qualifications and abilities of the employees being considered are not significantly different...."

[8] All dates hereafter refer to "1973," unless otherwise indicated.

arbitration proceeding "if the Company ever in fact is ordered to . . . disclose the actual tests as a result of a final court order". . . (A. 138-139). Accordingly, on December 3, the Arbitrator ruled that the Company did not violate the collective bargaining agreement by establishing an acceptable score on the test battery as a qualification for the Instrument Man B position, but directed the Company to re-examine the three employees with scores between 9.3 and 10.3 (P.A. 76a).[9] In so ruling, the Arbitrator underscored that the actual test questions "prove nothing" and that the "union's position was [not] damaged in any way by lack of access to the test" (P.A. 72a).

PROCEEDINGS BELOW

On the basis of the foregoing, the Board concluded that the Company's failure to furnish the Union with the requested information violated Section 8(a) (5) and (1) of the National Labor Relations Act ("the Act"). As remedy therefor, the Board (Member Kennedy, dissenting) ordered the Company to supply the Union with copies of the test battery, the applicants' test papers, and the applicants' test scores linked to individual names. In so ordering, the Board majority rejected the Administrative Law Judge's recommendation that the Company be required to deliver copies of the test battery, including the applicants' actual test papers, only to a "qualified psychologist" selected by the Union (P.A. 14a-17a).

The Sixth Circuit (Circuit Judge Weick, dissenting) enforced the Board's order, rejecting the Company's contentions that disclosure to the Union could destroy the utility of the tests, require the Company's industrial psychologists to breach their professional ethical code, and invade the privacy of the employees whose test scores the

[9] Upon re-examination, one employee was promoted to the Instrument Man job; two were again rejected (P.A. 39a).

Company is also required to divulge (P.A. 1a-12a). Subsequently, on November 22, 1977, the Sixth Circuit denied a petition for rehearing filed by the Company. On January 4, 1978, the Company filed a Petition for a Writ of Certiorari which this Court granted on March 27, 1978.

SUMMARY OF ARGUMENT

Under Section 8(a) (5) of the Act, the employer is obligated to furnish the union information "relevant" or "necessary" to the performance of its statutory duties *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). A failure to supply even relevant information does not, however, constitute a *per se* refusal to bargain in good faith. *NLRB v. Truitt*, 351 U.S. 149 (1956). Instead, in determining whether the employer's non-disclosure is in good faith, the NLRB is required to consider the "circumstances of the particular case" and to balance the conflicting interests at stake. *NLRB v. Truitt, supra*, 351 U.S. at 153-154. The NLRB and court below admittedly considered only the interests of the Union, disregarding (1) the Company's interest in its testing program; (2) the psychologists' interest in maintaining the ethical standards of their profession; and (3) the examinees' interest in privacy.

Test security — and the consequent utility of tests under Title VII of the Civil Rights Act — is jeopardized by the Board's disclosure requirement. Thus, the NLRB's restriction against unauthorized dissemination of the test battery [10] cannot be enforced in view of the impracticality of policing compliance therewith and the unavailability of a contempt sanction. In any event, even if the Union were adjudged in contempt for a violation of the "restriction," the Company is denied an adequate remedy since the tests

[10] The "restriction" is limited to the test battery itself; accordingly, the Union is not even arguably constrained from disseminating the actual test papers and employee scores.

will have been invalidated and revalidation of a test battery — apart from its cost — requires years and could again be defeated by a recalcitrant or "negligent" union official.

ARGUMENT

THE BOARD ERRONEOUSLY CONCLUDED THAT THE COMPANY'S FAILURE TO SUPPLY THE REQUESTED TEST MATERIALS VIOLATED SECTION 8(a) (5) AND (1) OF THE ACT

A. Section 8(a) (5) Of The Act Does Not Require Disclosure Of Information That Is Not Even "Probably Relevant" To The Union's Administration Of The Contract

In *NLRB v. Acme Industrial Co., supra,* this Court reaffirmed the employer's obligation under Section 8(a) (5) of the Act to provide the union information that is "probably" relevant to the discharge of its statutory responsibilities. *Acme,* we submit, establishes a rule of presumptive relevance of requested wage and related information; however, if the employer effectively rebuts the presumption, the burden shifts to the union to demonstrate relevance. *Emeryville Research Center, Shell Div. Co. v. NLRB,* 441 F.2d 880, 885 (9th Cir. 1971). Compare *Kroger Co. v. NLRB,* 399 F.2d 455, 459 (6th Cir. 1968).

The presumptive relevance of the desired test materials was rebutted by *uncontradicted* testimony that the *only* information necessary to determine the validity of the battery is the 1970 and 1972 validation studies that were provided at the April 2, 1973 meeting (A. 50-51, 71-72, 79-80, 191). Accordingly, disclosure of the battery itself is superfluous — a view obviously shared by the Arbitrator:

> The Union questioned the validity of the test by reference to the type of question asked. It was to further this line of questioning that the Union desired a copy of the test. But this was simply a questioning

> of the face validity of the test. Such questions, even if taken from the test itself, prove nothing. Face validity does not prove or disprove the validity of the test in determining the aptitudes necessary for successful job performance . . . In short, the Arbitrator does not believe that the Union's position was damaged in any way by lack of access to the test (P.A. 72a).

In light of the Company's effective rebuttal, the Union was not entitled under *Acme* to rely on a vague avowal of relevance to establish its right to the information:

> . . . [The tests] are an entirely new dimension. It was a new hurdle over which the employees had to jump before they'd even get consideration . . . I would see the relevance of the tests to the job. Obviously if there was Einstein's theory in there I would say that was an unfair test or things like that (A. 24).

In its opposition to the petition for certiorari, the Board apparently contends (Br. 7-8) that the Company's failure to except to the Administrative Law Judge's disclosure order constituted a tacit admission of the "probable" relevance of the test materials. However, the Law Judge required the Company merely to submit the test battery to a qualified psychologist retained by the Union — a proposal that the Company voluntarily advanced at the outset of the unfair labor practice hearing and, accordingly, would have no reason to challenge before the Board. Conversely, the *Board's* refusal to adopt the Law Judge's recommended order "revived" the exception and adequately preserved the point for judicial review. Compare *NLRB v. Ochoa Fertilizer Corp.,* 368 U.S. 318, 322 (1961).

In any event, the Board seeks to justify its disclosure requirement on the ground that the information may enable the Union to learn "whether the tests are truly job related or contain objectionable distortions . . ., whether they have built-in bias and are, in fact, discriminatory . . ." (P.A.

47a; Bd. Br. 7, n. 7). The Board, however, overlooks the essential, undisputed point that a valid and reliable test battery, by definition, will contain neither "distortions" nor "built-in bias." Indeed, the Board concedes (P.A. 47a; Br. 7, n. 7) that the statistics offered by the Company "tend to show that the tests are valid to serve *the employer's purpose;* i.e., they may serve to identify those employees likely to do well on the job" (emphasis in original). We submit that the Board's concession forecloses an argument before the Arbitrator that the tests are "discriminatory" or contain "objectionable distortions;" if the battery reliably predicts which employees will competently perform the vital duties of an Instrument Man B, the Arbitrator's inquiry is at an end.[11]

B. Disclosure of The Requested Information—Even If "Probably" Relevant Within The Purview Of Acme—Was Not Warranted Under NLRB v. Truitt

1. Introduction

In *NLRB v. Truitt, supra,* this Court, while concluding that an employer violated Section 8(a) (5) by declining to produce requested financial data to substantiate a claimed inability to afford a wage increase, cautioned:

> We do not hold . . . that in every case in which economic inability is raised as an argument against increased wages it automatically follows that the employees are entitled to substantiating evidence. Each case must turn upon its particular facts [footnote omitted]. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met (351 U.S. at 153-154).

[11] In its opposition to the petition, the Board maintains (Br. 7, n.7) that the Arbitrator "reserved the right of the Union to reopen the arbitration case if it obtained the materials through court order" — a point which the Board evidently raises to bolster its claim that the materials requested by the Union are, in fact, relevant. As a threshold difficulty, the Arbitrator did not *sua sponte* reserve the Union's right to reopen; he merely sanctioned an agreement of the parties (*supra, pp. 5-6.*) In any event, the Arbitrator did not indicate that his resolution of the contract issues was impeded by the unavailability of the materials requested by the Union. Accordingly, the Arbitrator would not reach a different result if the requested materials were before him — a circumstance which underscores the futility of the proposed disclosure.

As underscored by the dissenting Justices, the Board in *Truitt* had applied a wrong standard in ruling that the employer's failure to supply the requested financial information constituted a *per se* refusal to bargain in good faith. Subsequently, this Court confirmed that under *Truitt* a refusal to supply information is merely *evidence* of bad faith. *NLRB v. Insurance Agents' Int'l Union,* 361 U.S. 477, 487 (1960). See also *Shell Oil Company v. NLRB,* 456 F.2d 615, 618 (9th Cir. 1972). ("The Board asserts that once information is shown to be relevant to the Union's performance of its role as bargaining representative, this fixes the duty of the Company to produce and any failure to produce is *per se* an unlawful refusal to bargain. However, this is not the law."); *Kroger Co. v. NLRB, supra,* 399 F.2d at 456, 458 (*Truitt* requires consideration of the "circumstances of the particular case" and a balance of the "conflicting" interests at stake). See, generally, Fanning, *The Obligation to Furnish Information During The Contract Term,* 9 Ga. L. Rev. 375, 376 (1975). ("It is important to note that the [*Truitt*] Court was not making a *per se* finding").[12]

Initially, the Company's good faith should be evaluated in light of the "wealth of material" the Company did supply the Union (*supra, p.5*) — material which was "sufficient

[12] *NLRB v. Acme Industrial Company, supra,* 385 U.S. at 435-36, confirmed the employer's obligation to furnish the union information "necessary" to the performance of its statutory responsibilities, but did not disturb *Truitt's* rejection of a *per se* analysis of the "good faith" issue.

to permit the union to . . . perform its duties under the collective bargaining agreement" (P.A. 11a). In any event, the NLRB and court below — contrary to *Truitt* — failed either to consider the "circumstances of the particular case" or to balance the conflicting interests at stake. Indeed, the Company's violation of Section 8(a) (5) flowed automatically from the determination that the requested information was arguably "of value to the Union in fulfilling its responsibility to the employees" (P.A. 15a). The competing interests disregarded below included: (1) the Company's interest in its testing program; (2) the psychologists' interest in maintaining the ethical standards of their profession; and (3) the examinees' interest in privacy.

2. The Board's Restriction Does Not Protect The Company's Interest In Its Testing Program

In response to the Company's argument that unauthorized disclosure would invalidate the aptitude tests, the Board, with the approval of the court below, merely "restricted" the *Union* from disclosing their contents to employees — a restriction which dissenting Judge Weick termed "really naive" and which, in addition, conflicts with *Kirkland v. Department of Correctional Services*, 520 F.2d 420 (2nd Cir. 1975). (Nothing in Title VII requires or authorizes an "advance review" by minority applicants of the examination for the position to which they seek promotion.) [13] A threshold difficulty with a mere "restriction" is that nothing in the Board's court-enforced *order* requires the Union not to publicize the tests or their results; accordingly, the availability of a contempt sanction, we

[13] The Board seeks (Br. 8, n.8) to distinguish *Kirkland* on the ground that the order reviewed by the Second Circuit required disclosure to "potential test-takers." The Board evidently misses the fundamental point discussed in detail below: disclosure to the *Union*, rather than to a qualified psychologist, similarly risks "foreknowledge" of the examination by potential examinees and the consequent invalidation of the battery.

submit, is at best speculative.[14] Indeed, even assuming the Board's willingness to initiate contempt proceedings against the Union,[15] the Court, we submit, lacks jurisdiction to enter a contempt judgment against a nonparty "whose rights have not been adjudged according to law" *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13 (1945); *Chase Nat. Bank v. Norrwalk*, 291 U.S. 431, 436 (1934);

[14] A similar view was recently expressed by a commentator:

> The Court thought it could accomodate Detroit Edison's concerns by restricting the union's right to use the tests and by forbidding disclosure, but the restrictions are likely to be no more effective than the available sanctions. The general remedy for violation of a court-enforced Board order is to find the violator in civil contempt [footnote omitted], but where, as in *Detroit Edison*, the union does not intervene in the enforcement proceeding, the contempt sanction may be unavailable [footnote omitted]. Note *Psychological Aptitude Tests and the Duty to Supply Information: NLRB v. Detroit Edison Co.*, 91 Harvard Law Review 869, 875 (1978) (hereafter cited "Employee Test Disclosure").

The Board's contrary view (Br. 9-10, n.11) is based upon the proposition — for which the Board cites no authority — that the Union's acceptance of the requested materials subjects it to contempt proceedings for violation of the accompanying restrictions. However, the Board's "benefit-burden" theory does not invariably apply to a "third party beneficiary" of a court judgment entered in a proceeding to which it was not party.

[15] *Amalgamated Utility Wkrs. v. Consolidated Edison Co.*, 309 U.S. 261, 264 (1940), establishes that the Board has exclusive standing to institute contempt proceedings for failure to comply with a court-enforced Board order. Moreover, the institution of contempt proceedings, although dependent upon formal authorization by the Board, may be "short-circuited" by the General Counsel to whom the Board has delegated the discretionary authority to determine whether or not to seek contempt. See, generally, Bartosic and Lanoff, *Escalating the Struggle Against Taft-Hartley Contemnors*, 39 University of Chicago L.Rev. 225, 259-261 (1972). In any event, the Board itself has displayed a reluctance to pursue vigorously the contempt remedy. Bartosic and Lanoff, supra, at pp. 256-257. In light of the Board's contempt record, the Company can scarcely anticipate that the Board will authorize — or, indeed, that the General Counsel will even seek — contempt against a party which neither committed an unfair labor practice nor was otherwise on notice that its legal relationships were being adjudicated.

Alemite Mfg. Corp. v. Staff, 42 F.2d 832 (2nd Cir. 1930).[16] Moreover, as the authority cited by the Board (Br. 9-10, n. 11) recognizes, a contempt remedy is available only in the event of a *wilful* violation of the restriction; accordingly, *inadvertent* disclosure by the Union[17] poses a very substantial threat to test security undiminished by the "deterrence" of a contempt sanction. In any event, contrary to the Board (Br. 8-9), the assumption that the Union may intentionally violate the court-imposed restrictions is *not* unsupported; indeed, the record discloses the Union's hostility to a testing program which, in its view, threatens "seniority" as a primary determinant of employment conditions (A. 160-169).[18] Finally, even if the union were adjudged in contempt for a violation of the "restriction," the Company is denied an adequate remedy since the tests will have been invalidated and revalidation of a test battery requires years and could again be defeated by a recalcitrant or "negligent" union official.

In its opposition to the petition, the Board attempts to

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[16] In *Alemite* the court had enjoined Staff's employer from infringing Alemite's patent; after the injunction issued, Staff severed his relationship with his former employer and infringed the patent. In maintaining that Staff was not in contempt of the injunction issued against his former employer, the Second Circuit noted that "it is not the act described which the decree may forbid, but only that act when the defendent does it" (42 F.2d at 833). By the same token, even if the Union could be "enjoined," the injunction would not bind a former official, who could publicize the tests with impunity. *Harvey v. Bettis*, 35 F.2d 349, 350 (9th Cir. 1929).

[17] Even apart from ethical and professional constraints, qualified psychologists are in a far stronger position by virtue of their training and experience to prevent inadvertent dissemination of test materials.

[18] As the Harvard commentator observed:

> . . . [F]ears about dissemination are even more understandable when one recognizes that unions dislike testing because it modifies their seniority systems [footnote omitted]. If dissemination makes it more difficult for the company to use tests, the union may have little incentive to guard their confidentiality. *Employee Test Disclosure, supra*, 91 Harv. L. Rev. at 875.

rationalize rejection of the Law Judge's recommendation that the test battery be submitted only to a Union-retained psychologist:

> The Board decided to leave to the Union the decision whether it needed a psychologist to aid it in analyzing and interpreting the test materials [citation omitted]. Since the services of a professional psychologist are costly, the Board was reasonable in not requiring the Union to incur this expense unless it believed it was necessary for the intelligent processing of the grievance (Br. 8-9, n. 9).

However, the *uncontradicted* evidence (A. 77-78) supports the Law Judge's finding that the Union will require professional assistance to analyze the test materials.[19] Accordingly, the Union's only "decision" is whether to retain a psychologist or forego intelligent interpretation of the data.[20] By the same token, the expense will *necessarily* be incurred if the Union is interested in an analysis of the test materials. In any event, nothing in the Board's decision indicates that cost considerations underlie its order and under well settled rules of administrative law, the propriety of the Board's action must be judged solely on the grounds invoked by the agency — not by counsel's *post hoc* rationalizations. *SEC v. Chenery Corp.*, 318 U.S. 80 (1943); *FPC v. United Gas Pipeline Co.*, 393 U.S. 71 (1968).

Apart from its "reasonableness," the Board's restriction

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[19] As Judge Weick underscored:

> The furnishing of all the papers requested by the union would have required the assistance of a psychologist, but the union declined to accept such offer. These papers simply could not have been evaluated by a lay person (P.A. 11a).

[20] Significantly, the Union did not seek a "formal" psychological evaluation of the "wealth of material" (P.A. 9a) that the Company did supply — a circumstance which casts doubt on the *bona fides* of its request (A. 45).

is obviously not calculated to prevent unauthorized dissemination of the test battery. Thus, "the Union" to which the Board and Sixth Circuit have ordered disclosure at least arguably includes not only its executive officers but also grievance committee members, shop stewards or "agents" — in short, *several* potential examinees. Moreover, the risks of unauthorized disclosure obviously increase in direct ratio to the number of individuals entitled to receive or inspect the materials. Apart from mere numbers, Union representatives untrained in industrial psychology may, as discussed above, even innocently disseminate the test materials. Under the foregoing circumstances, policing Union compliance with the Board's restriction presents formidable, if not insuperable, obstacles.

3. The Board and Sixth Circuit Disregarded the Interests of the Industrial Psychologists and Examinees

Apart from the jeopardy to the Company's testing program, the Board and court below similarly disregarded the interests of the industrial psychologists and the examinees. Thus, as dissenting Judge Weick noted, the psychologists' disclosure of the aptitude test battery constitutes a violation of their profession's Code of Ethics and exposes the psychologists to disciplinary sanction, including suspension or even revocation of their licenses. For example, the "Standards for Educational and Psychological Tests and Manuals," published by the American Psychological Association ("APA") and recognized by the EEOC testing guidelines, impose upon psychologists who administer tests a responsibility — shared with the test developer or distributor — to maintain test security. In addition, Standard J2 of the APA Standards limits disclosure of test scores to individuals "qualified to interpret them." The Comment to J2 denies "test score" access to "curious peers" — among whom, we submit, may be included the employees represented by the Union.

Finally, the employees who are examined by the Company's psychologists, and with whom they enjoy a confidential and privileged relationship, have an unquestioned interest in privacy which neither the Board nor court below evaluated. Compare *Metropolitan Life Ins. Co. v. Usery*, 426 F. Supp. 150, 168 (D.D.C. 1976) ("The disclosure of information concerning an employee's promotion prospects, lack of promotion prospects, job performance evaluations, and personal preference and goals, and the reasons for an employee's termination contained in . . . [affirmative action plans] would constitute a substantial invasion of the companies' employees' personal privacy"). Accord: *Hughes Aircraft Co. v. Schlesinger*, 384 F. Supp. 292, 298 (C.D. Cal. 1974); *Westinghouse Electric Corporation v. Schlesinger*, 392 F. Supp. 1246, 1249-50 (E.D. Va. 1974), aff'd 542 F.2d 1190 (4th Cir. 1976).[21] Apart from a right of privacy granted under the Freedom of Information Act ("FOIA"), 5 U.S.C. §552, Congress has also recognized a privacy interest of students and parents under the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. §1232(g), to prevent the release of education records, including grades, test scores or "personally identifiable"

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[21] In its opposition to the petition, the Board mistakenly relies (Br. 11, n.12) upon *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969), in rejecting the contention that its order violates privacy interests of the employees. In *Wyman-Gordon*, this Court declined to disturb the Board's balancing of interests; in the instant case, the Board admittedly did not even consider the employees' privacy interests. Moreover, the disclosure requirement in *Wyman-Gordon* served an important statutory purpose of encouraging an informed employee electorate; in the instant case, nothing is accomplished by compelling disclosure to the Union of materials that are neither relevant to its statutory responsibilities nor, in any event, intelligible without professional assistance. Finally, whatever statutory objective is arguably promoted by the Board's disclosure requirement could be achieved by a more narrowly tailored order that does not impinge upon employees' privacy interests. For example, a "coding" system could be devised that would preserve individual employees' anonymity while providing the Union the requisite statistical data.

information. See also the Rules and Regulations of the Department of Health, Education and Welfare, 45 C.F.R. §99.30. The prohibition against the release of test scores — albeit in an "education," rather than employment, context — reflects a Congressional interest in minimizing perceived invasions of privacy. Indeed, the Board, while generally rejecting a privacy or confidentiality defense to a refusal to furnish requested information,[22] has itself invoked an invasion of employee privacy to resist disclosure of the names and addresses of employees eligible to vote in NLRB elections — information requested under the FOIA by law professors engaged in a NLRB voting study. *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971). In rejecting the Board's privacy defense, the *Getman* court pointed out:

> [A]lthough a limited number of employees will suffer an invasion of privacy in losing their anonymity and in being asked over the telephone if they would be willing to be interviewed [footnote omitted] in connection with the voting study, the loss of privacy resulting from this particular disclosure should be characterized as relatively minor . . . The giving of names and addresses is a very much lower degree of disclosure; in themselves a bare name and address give no information about an individual which is embarrassing (450 F.2d at 674-675).

In contrast, the challenged disclosure of test scores of named applicants is potentially *very* "embarrassing" — an embarrassment which is obviously not justified by a misperceived benefit to the Union from disclosure of the test data.

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[22] *E.g., Aluminum Ore*, 39 NLRB 1286, 1297 (1942); *Electrical Mfg. Co.*, 173 NLRB 878, 880 (1968). Compare, however, *McCulloch Corporation*, 132 NLRB 201, 207 (1961) in which the Board, citing a potential "breach of confidence," sustained the employer's refusal to disclose in negotiations a wage survey of its competitors who had provided the wage data only upon assurances that the information would remain confidential.

C. The Board's Disclosure Requirement, Adopted By The Sixth Circuit, Defeats The Company's Right Under Title VII Of The Civil Rights Act Of 1964 To Utilize Validated Aptitude Tests

We have demonstrated above that test security will be compromised by the challenged disclosure requirement and that, as a consequence, the use of aptitude tests under Title VII of the Civil Rights Act of 1964 is jeopardized. Yet, neither the Board nor the Sixth Circuit even considered the impact of the disclosure requirement upon the extensive testing programs in the private and public sectors that are encouraged by Title VII and the implementing regulations of the EEOC.

It is well settled that the National Labor Relations Act ("NLRA" or "Act") must be construed "in light of the broad national labor policy of which it is a part" [23] — including, of course, the national commitment to eradicate employment discrimination. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). Simply stated, the National Labor Relations Board cannot issue orders which have an impact on other employment legislation without carefully accommodating one scheme to another. Indeed,

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[23] *Emporium Capwell Co. v. Western Addition Commun. Org.*, 420 U.S. 50, 66 (1975). Compare *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942) in which this Court cautioned the Board:

> [T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

The NLRB itself has elsewhere acknowledged that the NLRA "cannot be administered in a vacuum. The Board must recognize the purposes and policies of other employment legislation, and construe the Act in a manner supportive of the overall statutory scheme." *Alleluia Cushion Co., Inc.*, 221 NLRB 999, 1000 (1975).

the Board must administer the Act in a manner supportive of the overall legislative program. *Southern Steamship Co. v. NLRB, supra.*

The decision below, requiring employers to grant unions access to their aptitude tests,[24] will threaten the very ability of companies to use such tests since the tests' security is critical to their usefulness. Obviously, if some individuals who ultimately will be taking the test have advance knowledge of the questions, the utility of the test will be destroyed. "The obvious security problem is to avoid having applicants know the test questions in advance. To maintain security, tests not in use should be kept under lock and key . . . Test security also implies a necessity for keeping tests out of the hands of people who are not competent to use them properly." [25]

The latter point is, of course, a critical issue in this case. Rather than order the tests to be delivered to an industrial psychologist chosen by the Union, the Board ordered that the test materials be given to the Union itself. While a psychologist is under professional and ethical obligations not to reveal the tests to non-experts, there is no practical constraint on the union's disclosure. Moreover, as noted above, the availability of a contempt sanction against the Union — viewed most charitably to the Board's position — is at best "speculative." Under the Board's decision, then, Detroit Edison will have no reasonable assurance that the tests' security will long be maintained — a cicrumstance which leaves the Company little choice but to abandon the use of tests altogether, thus thwarting its efforts to develop

[24] In addition, if carried to its logical conclusion, the Sixth Circuit result may also compel employers to disclose to unions supervisory evaluations, hiring interview reports or srimilar documents which may be considered "tests" under the Equal Employment Opportunity Commission, *Guidelines on Employee Selection Procedures.* 29 C.F.R. §1607.

[25] Guion, R.M., *Personnel Testing,* 1965, p. 504.

objective, nondiscriminatory selection standards which conform to the requirements of Title VII.

Accordingly, in defining the scope of the employer's obligation under Section 8(a) (5) of the Act to furnish information that may assist the union in performing its representative functions, the Board must consider the potential impact of its orders upon implementation of the Congressionally-mandated equality of employment opportunity — a goal which is facilitated by reliance upon properly validated and administered aptitude or ability tests. See, *e.g.,* Section 703(h) of Title VII of the Civil Rights Act,[26] Equal Employment Opportunity Commission ("EEOC") *Guidelines on Employee Selection Procedures,* 29 C.F.R. §1607.1(a) (". . . [P]roperly validated and standardized employee selection procedures can significantly contribute to the implementation of nondiscriminatory personnel policies . . . in the development and maintenance of an efficient work force and . . . the utilization and conservation of human resources generally").

[26] Section 703(h), which expressly authorizes an employer to administer and "act upon the results" of nondiscriminatory, professionally developed ability tests, was a response to *Myart v. Motorola, Inc.* (reproduced in its entirety at 110 Cong. Rec. 5662-64 (March 19, 1964), a decision by a hearing officer of the Illinois Fair Employment Practices Commission which, in the view of proponents of 703(h), jeopardized the continuance of employer testing programs:

> . . . [Myart] is highly unreasonable, because if Title VII were administered in this fashion, it would mean that an employer would be denied the means of determining the trainability and competence of a prospective employee, or the competence of one who is currently employed and who is being considered for promotion. (Remarks of Senator Tower (R. Tex.) at 110 Cong. Rec. 13, 492 (June 11, 1964)).

See also the exchange between Senators Fulbright (D. Ark.) and Ellender (D. La.), printed at 110 Cong. Rec. 9599-9600 (April 29, 1964). In short, the legislative history of Section 703(h) discloses a vital interest in protecting employer reliance upon properly validated tests in determining employment conditions.

See also *Griggs v. Duke Power Co., supra,* 401 U.S. at 433-34; *Albermarle Paper Co. v. Moody,* 422 U.S. 405, 430-31 (1975) (EEOC testing guidelines are entitled to "great deference").

Even a cursory analysis of the decisions below reflects a failure to accommodate the policies of the NLRA and Title VII. Thus, Section 8(a) (5) has never previously been construed to require an employer to disclose to unions aptitude tests or test scores achieved by named applicants. In fact, the General Counsel, citing the impact of a disclosure requirement upon the utility of tests, previously refused even to issue a complaint. *International Telephone and Telegraph, Federal Division,* 22-CA-499, 46 LRRM 1387 (1960). Nor is the Board's construction of Section 8 (a) (5) required or even contemplated by *NLRB v. Truitt Mfg. Co., supra,* which, as detailed above (pp. 10-12), defines the appropriate inquiry of the NLRB under the "good faith" requirement of Section 8(a) (5) in evaluating an employer's refusal to provide requested information. Moreover, as noted above, the significance under Title VII of properly validated and administered tests as a nondiscriminatory, objective determinant of employment conditions can scarcely be disputed. Compare *Albermarle Paper Co. v. Moody, supra,* 422 U.S. at 432-433; *Senter v. General Motors Corporation,* 532 F.2d 511, 529 (6th Cir. 1976), *cert. denied,* 429 U.S. 870 (1976), and cases cited at n. 56. Thus, the NLRB should have weighed the importance of employer compliance with the EEOC testing guidelines, which extend far beyond paper and pencil tests, against the importance of union access to information which is of no discernible benefit to the union or its members. The national labor policy in favor of open and good faith bargaining is hardly impaired by maintaining the privacy and confidentality of the test materials in question. In short, the failure of the Board and Sixth Circuit to evaluate the "good faith" requirement in light of Title

VII's policy to promote an objective selection process, of which "job-related" tests are an integral part, alone requires this Court to reverse the decision of the Sixth Circuit.

CONCLUSION

For the above-stated reasons, this Court should reverse the decision of the Court of Appeals.

Respectfully submitted,

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